NULLIFICATION BY INDIRECTION.

POSSIBLY the most novel and important contribution which the American people have made to the science of government is the constitution of the Supreme Court as a coördinate branch of the government with ample power to declare the meaning of the written compact and to nullify any law repugnant thereto. A novelty in 1787, it remains almost a rarity to-day. Neither in the constitution of the German Empire, closely as it approximates the federal Constitution in many respects, nor in the unwritten constitution of England, has there yet been constituted any court with such august and potential powers. While the highest court of the Swiss Confederation can declare a cantonal law invalid as repugnant to the constitution, it cannot thus adjudge void a federal law. Undoubtedly the framers of the Constitution were familiar with the great work of the English courts in putting an end to executive tyranny. Lord Camden's great decision on general warrants and that of Mansfield with reference to the outlawry of the turbulent Wilkes were, with them, political topics of foremost interest. The elder Chatham had even declared in the House of Lords that each member of the seemingly omnipotent House of Commons was liable to a civil action for not giving Wilkes his seat after his election, and while this opinion of the greatest statesman of his time was ridiculed by Mansfield, yet it had some support in the declaration of Lord Camden.

To the colonists especially the concept of the duty of the judiciary to nullify an *ultra vires* law was not altogether unfamiliar, for prior to the Constitution of 1787 questions had arisen in the colonial courts as to whether a law which had been passed in violation of a colonial charter was not a nullity. The first clear declaration of this judicial power was announced by the Superior Court of Judicature of Rhode Island in the famous case of Trevett *v.* Weedon, a year before the adoption of the federal Constitution, when that court invalidated a legislative statute on the ground that it operated to destroy the right of trial by jury, which had been secured to the litigant by the colonial charter, then become the constitution of the state. So novel and revolutionary seemed the action of the court, that the

judges who rendered this interesting decision were summoned before the legislative branch of the government and required to render their reasons for adjudging "an act of the General Assembly unconstitutional and so void," and they were only acquitted upon the ground that no charge of criminality had been referred against them.

To the framers of the Constitution, however, the theory of such judicial interference was very nebulous, for as late as 1825 so great a judge as John Bannister Gibson, in the case of Easkin *v.* Raub,[1] voicing the opinion of the Supreme Court of Pennsylvania, questioned the power of the judiciary in this respect. He boldly took issue with Chief Justice Marshall and claimed that it was "the business of the judiciary to interpret the laws, not scan the authority of the lawgiver"; he held "that it rests with the people in whom full and absolute sovereign power resides to correct abuses of legislation by instructing their representatives to repeal the obnoxious act."

As we know, it required all the commanding genius of John Marshall in the case of Marbury *v.* Madison [2] to establish upon a firm foundation the power and responsibility of the judiciary with respect to unconstitutional laws.

Too much cannot be said in praise of the cautious, conservative, and farsighted manner in which the Supreme Court — thus "the living voice of the Constitution" — has exercised this most delicate and important power.

All this, however, is apart from the real theme of the writer, which seeks to discuss the doctrine of the Supreme Court, as first announced in Vesey *v.* Fenno,[3] that the judiciary is without power to prevent the nullification of the rights of the states by the exercise of federal powers for unconstitutional purposes. It will be important to bear in mind the facts of the case with reference to which the decision was rendered. The Supreme Court had under consideration an internal revenue statute, whereby the taxing power of the federal government was deliberately used to destroy the circulating notes of state banks unquestionably issued under the reserved powers of the state. It was conceded that the tax was so excessive "as to indicate a purpose on the part of Congress to destroy the franchise of the bank." The Supreme Court might have rested its decision solely upon the ground that as the federal government had the power to provide a national currency and as it had undertaken

[1] 12 S. & R. (Pa.) 330. [2] 1 Cranch 137. [3] 8 Wall. 533.

to do so, it had the incidental power to "restrain by suitable enactments the circulation, as money, of notes not issued under its own authority." But the Supreme Court went further and in the following words laid down the doctrine that it was powerless to prevent the nullification of state rights by a perversion of federal powers :

"The judiciary cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people by whom its members are elected."

This, it may be said in passing, was the very reasoning of Gibson in Eaken *v.* Raub. Such was not the doctrine of John Marshall and his illustrious associates, for the great Chief Justice, in McCullough *v.* Maryland,[1] said:

"Should Congress, *under the pretext of exercising its powers*, pass laws for the accomplishment of *objects* not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Not only to Marshall, but to the framers of the Constitution and to the political philosophers from whom they drew their inspiration, the possibility of the exercise of an undoubted power for an illegitimate purpose and to accomplish an unlawful result was clearly recognized. In his Discourses on Government, Algernon Sidney had said that every governmental power should be employed "wholly for the accomplishment of the ends for which it was given." Thus, Hamilton, in The Federalist (No. 33), said:

"The propriety of a law in a constitutional light must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which, indeed, cannot be easily imagined) the federal legislature should attempt to vary the law of descent in any state, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the state? Suppose again that upon the pretense of an interference with its revenues it should undertake to abrogate a land tax imposed by the authority of the state, would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to these species of tax which the Constitution plainly supposes to exist in the state governments?"

[1] 4 Wheat. 423.

In his great speech of April 30, 1824, which was not unworthy of the masterly reply which followed, Senator Hayne said that if Congress

"may use a power granted for one purpose for the accomplishment of another and very different purpose, it is easy to show that a constitution on parchment is worth nothing."

Care must be taken to distinguish between the class of cases where the exercise of a federal power has an incidental, unintentional, but nevertheless destructive, effect upon some right of the people otherwise reserved, and the other class of cases where the exercise of federal power has been exercised, not for any object within the Constitution, but for the palpable and deliberate, and in some cases avowed, purpose of attaining some end that is not within the federal power. In our dual system of government, administered as it must be over a country that is for all commercial purposes and for many other purposes unified by the centripetal power of the railroad and the telegraph, it is inevitable that the exercise of many federal powers, such as the power to tax, must necessarily affect even to the point of destruction the exercise of state powers. As the state powers are necessarily subordinate to the paramount federal power, such destructive effects are constitutional. Marshall early recognized in the much quoted *dictum* that the power to tax was the power to destroy, and it was early recognized in the License Cases that the fact that the power to tax might involve the destruction of the trade in the thing taxed could not affect its constitutionality any more than a state prohibitory law would be unconstitutional, simply because its practical administration might deprive the federal government of revenues which it would otherwise secure. But while the distinction may not be easy to make in practice, yet there is a clear distinction between the exercise of a federal power with an incidental and unintentional effect upon some right of the states and the exercise of the same power with no real intent to effectuate any purpose of the federal government but simply to embarrass or destroy the rights of the states. Of the second class, the case of Vesey *v.* Fenno is a most striking illustration, for it cannot be gainsaid as an historical fact that the whole purpose of the prohibitive tax upon the currency notes of state banks was not to raise revenue but to prevent their emission. In Austin *v.* The Aldermen [1] the Supreme Court said:

[1] 7 Wall. 694.

"The right of taxation where it exists is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

In Treat *v.* White[1] the court said, referring to the power of taxation:

"The power of Congress in this direction is unlimited."

A still more striking illustration of this permitted perversion of federal power is afforded by the case of McCray *v.* The United States,[2] decided in 1904. The court there had under consideration the constitutionality of the designedly prohibitive tax upon colored oleomargarine. It was well known that the dairy interests had persuaded Congress to pass a law which placed so prohibitive a tax upon oleomargarine, colored to imitate butter, as to make it difficult to sell it openly in competition with butter. Obviously no revenue was either sought for or expected. To drive artificial butter from the market was the avowed purpose of Congress. The Supreme Court, however, held that the judiciary could not

"inquire into the motive or purpose of Congress in adopting a statute levying an excise tax within its constitutional power."

The present Chief Justice, in the case of *In re* Kollock,[3] where a less offensive tax on oleomargarine was under consideration, said:

"The act before us is, *on its face*, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object *must* be assumed to be the raising of revenue."

From these and other cases the doctrine is fairly deducible that where Congress passes a law in the exercise of one of its powers, the judiciary must conclusively assume that its purpose and object is to exercise that power, and no inquiry can be made into the true motive or purpose of Congress, however unconstitutional and improper and however destructive to the reserved rights of the states.

The same question again arose in the recent Commodities Case,[4] where it was strongly and persuasively argued to the court that the history of the legislation clearly showed that its purpose, although on its face a regulation of commerce, was not merely to regulate com-

[1] 181 U. S. 264.
[2] 195 U. S. 27.
[3] 165 U. S. 526.
[4] 213 U. S. 366.

merce but to compel railroads which, under the laws of the states, had acquired coal mines, to sell their coal mines at whatever sacrifice, but the court preferred so to narrow the construction of the statute as to avoid the constitutional question thus presented. The pivotal constitutional question in the Commodities Case, however, was anticipated in the Lottery Case,[1] in which the power of Congress to prohibit altogether interstate traffic in a commodity on moral considerations was sustained after a prolonged forensic struggle and three oral arguments.

Upon the doctrine of the cases previously cited, the prohibition of interstate traffic, being an acknowledged federal power, could be used for any purpose or object, so far as judicial interference is concerned. If so, what becomes of the rights of the states?

From these decisions has grown a well-founded belief on the part of many eminent publicists and statesmen that the admitted powers of federal government can be freely exercised without judicial let or hindrance, even though used with the sole purpose of destroying rights which are concededly reserved to the states. Possibly the most striking illustration of this new doctrine of nullification by indirection will be found in the struggle that has continued since 1890 to destroy large industrial combinations. It is sometimes erroneously stated that the Sherman Anti-Trust Law was a piece of hasty and inconsiderate legislation. The very contrary is the fact. The first bill was introduced by Senator Sherman, August 14, 1888, and the statute was the composite result of many drafts and prolonged debate. In the Fiftieth Congress twenty bills were introduced; in the Fifty-first Congress twenty-three bills were introduced; in the Fifty-second Congress, sixteen; in the Fifty-third, seventeen; in the Fifty-fourth, eight; in the Fifty-fifth, eleven; in the Fifty-sixth, twenty-one; and in the first session of the Fifty-seventh, twenty-two. These bills excited prolonged discussion in both houses of Congress, and the debates comprised thousands of printed pages. Throughout all these discussions it was suggested again and again that if the federal power could not directly interfere with the formation and operations of large state corporations, that it could and should do so indirectly by so exercising federal powers as to make it impossible for the state corporations to exist when they reached the commercial dimensions of a so-called "trust." Thus, it was suggested that a destructive

[1] Champion *v.* Ames, 188 U. S. 321.

internal revenue tax could be imposed as had been done with the currency of state banks; graded excise taxes were proposed to discourage excessive capitalization; the mails were to be denied to monopolistic trusts. The denial to them of a right of appeal to the federal courts was also suggested. National banks and other government fiscal agencies were to be prohibited from receiving on deposit or accepting as collateral any stocks, bonds, or securities of a trust. Patents or copyrights owned by a trust should be forfeited. It was even suggested that the United States government should not deposit government moneys in any bank which in any manner deals with the stocks, bonds, or securities of a trust. Under the Commerce Clause it was proposed that no corporation should engage in interstate commerce without obtaining a federal charter and subjecting all its contracts to the supervision of a government bureau; trust-made commodities were to be forbidden access to the channels of interstate and foreign trade. Indeed, the statute as finally passed provided for confiscation of such commodities while in transit, a remedy so drastic that the government has never but once attempted to invoke it.

Can it be said that these remedies, advocated by leading and responsible leaders of public thought, would have been ineffective as weapons of destruction? Take the denial of postal facilities alone. How could any industrial trust conduct its business if it were denied access to the federal mails over which the federal government has exclusive jurisdiction? It is true that in 1836 the right of Congress to exclude anti-slavery literature from the mails was disputed, but in the later cases of *Ex parte* Jackson [1] and *In re* Rapier [2] the Supreme Court recognized that

"the right to designate what shall be carried [in the mail] necessarily involves the right to determine what shall be excluded."

In a noteworthy speech delivered at Pittsburgh October 14, 1902, the then Attorney-General, Mr. Knox, urged that Congress may

"deny to a corporation whose life it cannot reach the privilege of engaging in interstate commerce except upon such terms as Congress may prescribe to protect that commerce from restraint."

This statement was much quoted and much misunderstood. Mr. Knox, who is a very conservative interpreter of the Constitu-

[1] 85 U. S. 727. [2] 143 U. S. 110.

tion, simply meant that Congress could prescribe the terms of participation in interstate commerce when Congress deemed such terms necessary "to protect that commerce [*i. e.* interstate commerce] from restraint."

This statement was accepted by many as an affirmation of the power of Congress to deny the facilities of interstate commerce to any state corporation, except upon such terms as Congress deemed proper, even though such terms had no legitimate relation to interstate commerce or any federal purpose, a view which Mr. Knox vigorously disavowed in the Senate when the Commodities Clause was under discussion. Nevertheless, if the judiciary is powerless to place any limitation upon any federal power by invalidating a clear misuse of such power, was the misinterpretation of Mr. Knox's statement without some sanction from the Supreme Court itself?

The doctrine of nullification by indirection having received judicial sanction, it is not strange that many plans are now openly advocated to have the federal government exercise the police powers of the state by a perversion of its own powers. Of such a plan Senator Beveridge's Child Labor Bill is an instance. Here is a subject beyond question exclusively within the police power of the state. There is not a pretense that Congress has any power to determine the conditions with respect to age under which employment can be had in the states, but it is sought by a federal statute to prevent such child labor by denying to any product that had been manufactured by such labor access to the channels of interstate trade, and, remarkable as the suggestion must seem to old-fashioned lawyers and destructive as it unquestionably is to our dual system of government, it must be admitted that the proposition may be within the doctrine that the judiciary cannot question the purpose and motive of the exercise by Congress of a federal power. It is enough that Congress in its wisdom has concluded that a certain class of commodities should not be carried from state to state or in foreign commerce.

During the discussion of the Child Labor Bill, this doctrine was sought to be reduced to an absurdity by Senator Gallinger, who gravely inquired of Senator Beveridge whether Congress could prohibit the interstate transportation of milk which had been milked by a red-headed girl. Consistency required Senator Beveridge to answer in the affirmative, but he ignored the question. While the Titian-like tresses of the milkmaid can have no legitimate reference to the safety

or welfare of the people in the interstate transportation of milk, yet, on the authority of Vesey *v.* Fenno [1] and McCray *v.* The United States,[2] how could the judiciary review the purpose or motive, however unconstitutional, of Congress in providing that milk, produced in a certain way, should not be carried from state to state?

Perhaps the most remarkable suggestion to nullify the reserved rights of the people by an indirect use of federal power was that made by Mr. Roosevelt on Georgia Day at the Jamestown Exhibition. The President had advocated a bill providing that all employees should receive compensation from employers for any accident suffered in the course of their employment, even though the accident happened without any negligence on the part of the employer and with the grossest neglect on the part of the employee. Except so far as the employers were engaged in interstate traffic, these questions of the relative rights of the employer and employee were peculiarly within the reserved rights of the states, but the President said:

"There should be the plainest and most unequivocal statement by enactment of Congress to the effect that railroad employees are entitled to receive damages for any accident that comes to them as an incident to the performance of their duties, and the law should be such that it will be impossible for the railroads successfully to fight it without thereby forfeiting all right to the protection of the federal government under any circumstances."

Mr. William J. Bryan is, of course, not far behind his illustrious rival in the drastic character of the remedies that he advocates. In his magazine debate with Senator Beveridge several years ago Mr. Bryan says:

"Congress has power to control interstate commerce, and the decision of the Supreme Court in the Lottery Case leaves little doubt that that power can be so exercised as to withdraw interstate railroads and telegraph lines and the mails from the corporations which control enough of the product of any article to give them a virtual monopoly."

Putting together the two remedies, it must be admitted that they are sufficiently drastic, for if one of the prescribed corporations can neither sue in the federal court, transport its freight on interstate railroad lines, telegraph a message, mail a letter, nor enjoy the federal banking facilities, its outlawry would be complete.

[1] *Supra.* [2] *Supra.*

The effect upon contemporary politics of this new principle of constitutional jurisprudence is forcefully shown by the new Corporation Tax Law, the main justification of which was that it would enable the federal government to investigate exclusively domestic corporations, which otherwise would be beyond the federal inquisitorial powers.

The logical application of these doctrines would be that in a time of general confiscatory legislation Congress could shut the doors of the federal courts to any railroad which sought to invoke the Fourteenth Amendment if it venture to question the constitutionality of an act of Congress.

The states also have taken up with destructive effect this doctrine. In some, no insurance company can do business unless it first practically waives its right under the federal Constitution to sue in the federal courts, and after some indecision the Supreme Court has sustained this form of nullification by indirection.[1] The logic of this is that any state can compel a foreign corporation not engaged in interstate commerce or some other federal activity to waive all its rights under the federal Constitution if it desires to do business in the state. This results from Paul *v.* Virginia,[2] easily one of the two most mischievous decisions the Supreme Court ever announced.

While this article was in preparation, the Supreme Court indicated for the first time in several decades its purpose to modify the doctrine of Paul *v.* Virginia. Kansas *v.* Western Union Telegraph Co.[3] and the Pullman Palace Car Co.[4] decided during the present term of the court, held that if a state imposes, as a condition precedent to the right of a foreign corporation to do business wholly within the state, a condition that is a burden upon the right of this corporation to engage also in interstate commerce, such condition is void. In these cases, the state of Kansas required the two foreign corporations to pay a tax upon their entire capital stock, as a condition of the right to do business wholly within the state of Kansas, and this was adjudged unlawful. Unfortunately, as in so many important cases of recent years, a majority of the court could not join in the same reasoning, for, while five justices united in the judgment, one of them (Mr. Justice White) placed his decision upon narrower grounds. These decisions, however, indicate a significant departure from previous

[1] See Prewitt *v.* Kentucky, 202 U. S. 246.
[2] 8 Wall. 168.
[3] 216 U. S. 1.
[4] 216 U. S. 56.

decisions and make it probable that in the future a state cannot so exercise its right as to exclude a foreign corporation from engaging in a business which is non-federal in character except upon conditions which burden the rights of such foreign corporation under the federal Constitution. If this be so, why should the federal government be permitted, so far as judicial interference is concerned, to nullify indirectly the reserved rights of the states by the exercise of federal powers?

It may be suggested, however, that this perversion of the taxing power has had familiar illustration from the very beginning of our government in the protective tariff, and that acquiescence in this method of building up one industry and destroying another has been so consistent and is now so universal that it has become a part of our system of government; but this suggestion ignores the undoubted fact that the power to impose protective duties was never based upon the power of taxation, but upon the power to regulate foreign commerce and exclude alien commodities, as to which the power of the federal government is paramount and plenary. This distinction was clearly recognized by the framers of the Constitution. Benjamin Franklin, in the great inquiry at the bar of the House of Commons on February 3, 1766, when asked whether Parliament had no right to lay taxes and duties, replied:

"I never heard any objection to the right of laying duties to regulate commerce, but a right to lay internal taxes was never supposed to be in Parliament as we are not represented there."

The same distinction is found in John Dickinson's Letters from a Farmer, and by William Pitt in his Reply to Grenville. In the memorials addressed to the Crown by the Continental Congress of October 4, 1774, the same distinction was referred to. Prohibitive duties on imports, therefore, come within the sovereign power of the nation to determine what goods shall enter our ports of entry, and if so upon what terms, and this power had been used from time immemorial to foster domestic industries.

The very serious question, however, suggests itself as to whether it is reasonably possible for the judiciary to determine whether a federal power has been exercised for a federal end or for some ulterior purpose. Undoubtedly this task, if ever assumed by the judiciary, would be even more delicate and embarrassing than the ordinary

exercise of the power of adjudging a statute unconstitutional. In many instances it would be beyond the power of the judiciary to determine that a congressional act was not what on its face it purported to be, and it is wholly probable therefore that this nullification by indirection could never be wholly prevented, especially where a taxing statute is used for unconstitutional purposes. Nevertheless, unless our dual system of government is to be subverted the Supreme Court must return to the doctrine of Marshall that,

"should Congress, under the pretext of exercising its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."

To this conclusion, it is the belief of the writer, the court will, indeed must, come. It moves with caution and yet, when the necessity arises, it does not hesitate to recede from a fatally destructive position. Let Senator Beveridge's Child Labor Bill ever come before the court as a statute, and it is believed that that tribunal will modify that which it said in Vesey *v.* Fenno and the other cases cited. It is not only "the living voice of the Constitution," but it is also the conscience of the nation. To the doctrine of judicial impotence will yet come some saving qualification.

Already the Supreme Court makes a distinction between a state statute and a federal statute. As to the former, the Supreme Court has declared repeatedly that it will look beyond the form of the statute, and even its language, and will consider in the light of its history its substantial purpose and its inevitable effect; and even though apart from such purpose and effect the statute be an undoubted exercise of the right of the state legislature, the Supreme Court, disregarding the shadow and looking to the substance, will declare it unconstitutional. Thus, in Henderson *v.* The Mayor of New York,[1] Mr. Justice Miller said:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

In Morgan *v.* Louisiana[2] the same able justice said:

"In all cases of this kind it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power

[1] 92 U. S. 259. [2] 118 U. S. 455.

or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose."

In Collins *v.* New Hampshire [1] the late Mr. Justice Peckham said:

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

In Mugler *v.* Kansas [2] Mr. Justice Harlan said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty — indeed are under the solemn duty — to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

In Fairbanks *v.* The United States [3] Mr. Justice Brewer said:

"In other words, that decision [referring to Woodruff *v.* Parham, 8 Wall. 123], forms the great principle that what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result."

In Postal Telegraph Co. *v.* Adams [4] Chief Justice Fuller said:

"The substance and not the shadow determines the validity of the exercise of power."

In Smith *v.* St. Louis Ry. Co.[5] Mr. Justice McKenna said:

"Any pretense or masquerade will be disregarded and the true purpose of the statute ascertained."

No more clear or vigorous expression could be expected or required. But all these declarations were made with reference to state statutes, which, under the pretense of exercising state powers, had the indirect effect of nullifying a federal power. As, however, an equal

[1] 171 U. S. 30. [2] 123 U. S. 623. [3] 181 U. S. 294.
[4] 155 U. S. 688. [5] 181 U. S. 248.

duty is upon the Supreme Court to adjudge a federal act unconstitutional when it invades the reserved rights of the states, why should not the same judicial scrutiny of the obvious purpose and object of a statute be had in one case as in the other? Is this glaring discrimination either logical or tenable? Whatever it is, it undoubtedly exists.

If the doctrine to which the writer has referred is as pernicious as this argument seeks to establish, how does it then happen that our dual system of government is still preserved? The answer to this is twofold. As long as this government was one of widely scattered communities, between whom intercommunication was slight and unimportant, there could be little real danger of this indirect use of federal powers, but the railroad and the telegraph have united the American people unto a unity of life, of which the fathers of the Republic could never have had even the faintest conception. To-day our dual system of government attempts that which to the writer is an impossible task of dividing essentially an indivisible thing, for commerce, with the ever tightening bands of the railroad and the telegraph, is to-day so unified that the distinction which formerly prevailed with reason between interstate and domestic commerce is no longer practical for many purposes. This has given an overshadowing importance to federal powers, such as taxation, banking, the regulation of commerce, the disbursement of the public funds, and the administration of justice in the federal courts. The danger which formerly was slight and unappreciable, has therefore become an imminent peril. Until comparatively recent years there was a sleepless jealousy of the central government, and this operated to restrain many perversions of the federal power, but since the mighty contest to preserve the integrity of the Union, and due even more largely to the centripetal influences referred to, the insistence upon the reserved rights of the states has become little more than a political platitude. There is little, if any, real popular sentiment of sufficient strength to protect the states against the encroachment of the federal government. The "appeal to the people," of which Gibson and the Supreme Court spoke in the decisions cited, is valueless to protect the rights of the states from federal encroachment. Men have been trained by imperative economic influences to look to the central government as the real political government, and to the states as little more than subordinate provinces useful for purposes of local police

regulation and nothing more. This tendency seems to be in the very nature of events. It is the work of no especial political party or of any political leader. It can no more be stopped than the ocean could be dammed. The American people think nationally and not locally, as they once thought locally and rarely nationally, and propositions, such as have been instanced, are gravely debated in Congress by responsible leaders of public thought, at which Alexander Hamilton would have stood aghast. Could it be imagined for one moment that Alexander Hamilton would have approved the Child Labor Bill, or the destruction of state currency by the imposition of a prohibitive tax? To him the furthest verge of federal power was the creation of the Bank of the United States, but the destruction of state banks of circulation by a federal taxing statute was beyond his anticipation. Until that possibly inevitable day, when by constitutional amendment full power over all trade and commerce without respect to its domestic or interstate character is vested in the federal government, as it is in all other federated nations, it is none the less the solemn duty of both state and nation to respect the limitations upon the powers of each as provided by the Constitution. This may not be possible, unless the Supreme Court recedes from its extreme doctrine of impotence with respect to unquestioned perversions of federal power and adopts towards them the same attitude as it now does towards state statutes of avoiding every law whose purpose and inevitable effect is to encroach upon rights not delegated to the federal government.

To quote the solemn warning of the present venerable Chief Justice in his dissenting opinion in the Lottery Cases:[1]

"Our form of government may remain notwithstanding legislation or decision, but as long ago observed it is with governments as with religions the form may survive the substance of the faith."

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[1] *Supra.*